U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 June 2006

In the Matter of:

JAMES L. NIXON,
Claimant

Case No. 2005-BLA-5441

v.

U.S. STEEL MINING CO., LLC,
Employer

and

UNITED STATES STEEL CORP.,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

Gloria Brown Collins, Esq.
Collins & Robinson, LLC
Birmingham, Alabama
For the Claimant

Justin Davis, Esq.
Walston Wells LLP
Birmingham, Alabama
For the Employer

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. The Act and implementing regulations, 20 CFR Parts 410, 718, 725 and 727, provide compensation and other benefits to living coal miners who are totally disabled due

to pneumoconiosis and their dependents, and surviving dependents of coal miners whose death was due to pneumoconiosis. The Act and regulations define pneumoconiosis, commonly known as black lung disease, as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. 30 U.S.C. § 902(b); 20 CFR § 718.201 (2005). In this case, the Claimant, James Nixon, alleges that he is totally disabled by pneumoconiosis.

I conducted a hearing on this claim on May 24, 2005, in Birmingham, Alabama. Both parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 CFR Part 18 (2005). At the hearing, the Claimant was the only witness. Transcript ("Tr.") at 11-20. Director's Exhibits ("DX") 1-26 and Employer's Exhibits ("EX") 1-7 were admitted into evidence as Claimant's objections to their admission were overruled. Tr. at 7-9. Claimant did not offer any additional exhibits. Tr. at 6. Counsel for the Claimant gave a closing argument at the hearing. The Employer submitted a closing brief after the hearing, and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record pertaining to the claim before me, including all exhibits admitted into evidence, the testimony at hearing and the arguments of the parties.

PROCEDURAL HISTORY

The Claimant filed this claim on September 11, 2003. DX 2. The Director issued a proposed Decision and Order awarding benefits on September 29, 2004. DX 18. The Employer appealed on October 12, 2004. DX 19. The claim was referred to the Office of Administrative Law Judges for hearing on January 6, 2005. DX 23.

APPLICABLE STANDARDS

This claim was filed after March 31, 1980, and after January 19, 2001, the effective date of the current regulations. For this reason, the current regulations at 20 CFR Parts 718 and 725 apply. 20 CFR §§ 718.2 and 725.2 (2005). In order to establish entitlement to benefits under Part 718, the Claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, and that his pneumoconiosis is totally disabling. 20 CFR §§ 718.1, 718.202, 718.203, 718.204, and 725.103 (2005).

ISSUES

The issues contested by the Employer are:

1. Whether the claim was timely filed.

2. Whether the Claimant was a miner within the meaning of the Act;

3. Whether he has pneumoconiosis as defined by the Act and the regulations.

4. Whether his pneumoconiosis arose out of coal mine employment.

5. Whether he is totally disabled.

DX 23; Employer's Pre-Hearing Statement; Tr. 5-6. The Employer also reserved its right to challenge the statute and regulations. DX-12, 23.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and the Claimant's Testimony

Mr. Nixon testified that he worked in the coal mines from 1973 to 1977. His last coal mine employment was in Alabama. DX 3; Tr. at 18. Therefore this claim is governed by the law of the Eleventh Circuit. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989) (en banc). Claimant married Velma Haynes on January 1, 1983 and he has no children under eighteen or dependent. DX 2. Claimant alleged in his application for benefits that he worked for four years in coal mine employment. The Director found, and the Employer stipulated to three years and eleven months. I find that the Claimant had at least three years eleven months of coal mine work. DX-2, 3, 23; Tr. at 10.

Status as Miner

The 1977 amendments state that the purpose of the Act is to provide benefits, in cooperation with the states, to miners who are totally disabled due to coal workers' pneumoconiosis, and to surviving dependents of miners whose death was due to such disease. 30 U.S.C. § 901(a). Thus, a prerequisite to establishing entitlement to benefits is proving that the claim is on behalf of a coal miner or a survivor of a coal miner. The amended regulations at 20 CFR § 725.101(a)(19) provide:

> Miner or coal miner means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. The term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment (see § 725.202). For purposes of this definition, the term does not include coke oven workers.

20 C.F.R. § 725.101(a)(19) (2005).

Moreover, the new regulation at 20 CFR § 725.202(a) provides a new rebuttable presumption that certain individuals are miners, as follows:

> (a) Miner defined. A 'miner' for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine

construction or maintenance in or around a coal mine or coal preparation facility. *There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner.* This presumption may be rebutted by proof that:

> (1) The person was not engaged in the extraction, preparation, or transportation of coal while working at the mine site, or in maintenance or construction of the mine site; or
>
> (2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

Mr. Nixon testified that he worked in various jobs in the coal mines, and gave similar information on his work history form. Tr. at 11-14; DX 3. He stated that he first worked as an "underground junkie" and did anything, wherever he was sent, that needed done. He did jobs such as moving railroad tracks, hauling coal and cutting coal at the face. He testified that his last job was as a scoop operator, where he was involved in the clean-up and installation of ventilation after the loader cut the coal and left fragments. Tr. 14. Although the Employer contested this issue, it has not presented any evidence or argument to rebut the presumption that Mr. Nixon was a miner. Therefore, I find that Mr. Nixon was a miner within the meaning of the Act.

Timeliness

Under 20 CFR § 725.308(a), a claim of a living miner is timely filed if it is filed "within three years after a medical determination of total disability due to pneumoconiosis" has been communicated to the miner. 20 CFR § 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed. This statute of limitations does not begin to run until a miner is actually diagnosed by a doctor, regardless of whether the miner believes he has the disease earlier. *Tennessee Consolidated Coal Company v. Kirk*, 264 F.3d 602 (6th Cir. 2001).

Claimant testified that he went to the doctor for a blood pressure check and an x-ray was performed that showed he had "dust on his lungs." He testified that the United Mine Worker's union sent him to a doctor who diagnosed him with "dust on the lungs." Tr. at 15-16. On cross-examination, he stated that it might have been Dr. Hawkins that he was sent to by the UMW. Tr. at 20. He was not asked whether any doctor ever told him he was totally disabled by pneumoconiosis, nor is there any evidence in the record that any doctor made such a statement before he filed his claim. Although listed as a contested issue, the Employer has offered no evidence or argument on this issue. I therefore find that the claim is timely.

Medical Evidence

Chest X-rays

Chest x-rays may reveal opacities in the lungs caused by pneumoconiosis and other diseases. Larger and more numerous opacities result in greater lung impairment. The following table summarizes the x-ray findings available in this case.

The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. Small opacities (1, 2, or 3) (in ascending order of profusion) may classified as round (p, q, r) or irregular (s, t, u), and may be evidence of "simple pneumoconiosis." Large opacities (greater than 1 cm) may be classified as A, B or C, in ascending order of size, and may be evidence of "complicated pneumoconiosis." A chest x-ray classified as category "0," including subcategories 0/-, 0/0, 0/1, does not constitute evidence of pneumoconiosis. 20 CFR § 718.102(b) (2005). Any such readings are therefore included in the "negative" column. X-ray interpretations which make no reference to pneumoconiosis, positive or negative, given in connection with medical treatment or review of an x-ray film solely to determine its quality, are listed in the "silent" column.

Physicians' qualifications appear after their names. Qualifications have been obtained where shown in the record by curriculum vitae or other representations. Qualifications of physicians are abbreviated as follows: A= NIOSH certified A reader; B= NIOSH certified B reader; BCR= board-certified in radiology. Readers who are board-certified radiologists and/or B readers are classified as the most qualified. See *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993). B readers need not be radiologists.

Date of X-ray	Read as Positive for Pneumoconiosis	Read as Negative for Pneumoconiosis	Silent as to the Presence of Pneumoconiosis
12-18-03	DX 9 Ballard, BCR, B, 1/0		DX 9 Barrett, BCR, B (quality reading: 3) EX 3, Wiot, BCR, B (overexposed and unacceptable for evaluation by ILO standards)
07-09-04		EX 1 Goldstein, B EX 4 Wiot, BCR, B	

Pulmonary Function Studies

Pulmonary function studies are tests performed to measure obstruction in the airways of the lungs and the degree of impairment of pulmonary function. The greater the resistance to the flow of air, the more severe the lung impairment. The studies range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV).

The following chart summarizes the results of the pulmonary function studies available in this case. "Pre" and "post" refer to administration of bronchodilators. If only one figure

appears, bronchodilators were not administered. In a "qualifying" pulmonary study, the FEV_1 must be equal to or less than the applicable values set forth in the tables in Appendix B of Part 718, and either the FVC or MVV must be equal to or less than the applicable table value, or the FEV_1/FVC ratio must be 55% or less. 20 CFR § 718.204(b)(2)(i) (2005).

Ex. No. Date Physician	Age Height[1]	FEV_1 Pre-/ Post	FVC Pre-/ Post	FEV_1/ FVC Pre-/ Post	MVV Pre-/ Post	Qualify?	Physician Impression
DX 9 12-18-03 Hawkins	62 73"	1.61	1.93	83%	42	Yes	Suboptimal MVV performance; severe restrictive defect
EX 1 07-09-04 Goldstein	63 71"	1.82 1.72	2.16 1.98	84% 86%	74 75	Yes Yes	Restrictive defect with an abnormal diffusion capacity that normalizes when corrected for alveolar volume

Arterial Blood Gas Studies

Blood gas studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The blood sample is analyzed for the percentage of oxygen (PO_2) and the percentage of carbon dioxide (PCO_2) in the blood. A lower level of oxygen (O_2) compared to carbon dioxide (CO_2) in the blood indicates a deficiency in the transfer of gases through the alveoli which may leave the miner disabled.

The following chart summarizes the arterial blood gas studies available in this case. A "qualifying" arterial gas study yields values which are equal to or less than the applicable values set forth in the tables in Appendix C of Part 718. If the results of a blood gas test at rest do not satisfy Appendix C, then an exercise blood gas test can be offered. Tests with only one figure represent studies at rest only. Exercise studies are not required if medically contraindicated. 20 CFR § 718.105(b) (2005).

[1] The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221, 1-223 (1983); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 114, 116 (4th Cir. 1995). As there is a variance in the recorded height of the miner from 71" to 73", I have taken the mid-point (72") in determining whether the studies qualify to show disability under the regulations. I note, however, that all of the tests are qualifying to show disability whether considering the mid-point, or the heights listed by the persons who administered the testing.

Exhibit Number	Date	Physician	PCO_2 at rest/ exercise	PO_2 at rest/ exercise	Qualify?	Physician Impression
DX 9	12-18-03	Hawkins	46	60	Yes	Gas exchange marginal
EX 1	07-09-04	Goldstein	43 42	76 86	No No	Minimal degree of hypoxemia at rest

Medical Opinions

Medical opinions are relevant to the issues of whether the miner has pneumoconiosis, whether the miner is totally disabled, and whether pneumoconiosis caused the miner's disability. A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. 20 CFR §§ 718.202(a)(4) (2005). Thus, even if the x-ray evidence is negative, medical opinions may establish the existence of pneumoconiosis. *Taylor v. Director, OWCP*, 9 B.L.R. 1-22 (1986). The medical opinions must be reasoned and supported by objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. 20 CFR § 718.202(a)(4) (2005). Where total disability cannot be established by pulmonary function tests, arterial blood gas studies, or cor pulmonale with right-sided heart failure, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. 20 CFR § 718.204(b)(2)(iv) (2005). With certain specified exceptions not applicable here, the cause or causes of total disability must be established by means of a physician's documented and reasoned report. 20 CFR § 718.204(c)(2) (2005). The record contains the following medical opinions relating to this case.

Dr. Jeffrey Hawkins examined Mr. Nixon on behalf of the Department of Labor on December 18, 2003. DX 9. Dr. Hawkins is board-certified in internal medicine, pulmonary disease and critical care. He took occupational, social, family and medical histories, and conducted a physical examination, chest x-ray, blood gas studies and pulmonary function testing. He reported that he had reviewed Mr. Nixon's coal mine employment form completed with this claim. He reported a smoking history of ½ pack per day beginning at age 17, ending in 1983. The chest examination was normal. Dr. Hawkins reported that the x-ray showed parenchymal changes consistent with pneumoconiosis. The pulmonary function test showed no airflow obstruction and a severe restrictive impairment. Dr. Hawkins reported that the arterial blood gas study revealed that gas exchange was marginal, and noted that the test result met the disability criteria. Dr. Hawkins diagnosed chronic bronchitis, based on complaints of chronic cough, sputum production and some dyspnea. He indicated that the etiology was atopic. Dr. Hawkins also diagnosed pneumoconiosis, based on some dyspnea, exposure history, impaired gas exchange and abnormal x-ray. Dr. Hawkins found that Mr. Nixon had a mild respiratory

impairment in function based on his lungs, based on some exertional dyspnea, nocturnal cough, and stated that the miner should avoid additional exposure. He attributed the mild respiratory impairment 40% to chronic bronchitis, and 60% to pneumoconiosis. DX 9.

Dr. Allan Goldstein examined Mr. Nixon on July 9, 2004 on behalf of the Employer. EX1. Dr. Goldstein is board-certified in internal medicine and pulmonary disease, and is a B reader. EX 2. He took occupational, social, family and medical histories, and conducted a physical examination, chest x-ray, EKG, blood gas studies and pulmonary function testing. He reported that Mr. Nixon worked for four years in the coal mines, from 1973 to 1977, and worked as a laborer, ran a motor and ran a scoop. He reported a smoking history of ½ pack per day for twenty years, ending twenty-one years ago. The chest examination was normal. Dr. Goldstein read the x-ray as showing no evidence of pneumoconiosis. The EKG showed no acute ischemic changes and no evidence of myocardial infarction. The pulmonary function test showed a restrictive defect with an abnormal diffusion capacity that normalizes when corrected for alveolar volume. The arterial blood gas study revealed a minimal degree of hypoxemia at rest, but was otherwise normal. With exercise, the arterial blood gases improved. Based upon his examination, Dr. Goldstein concluded that Mr. Nixon was not suffering from coal worker's pneumoconiosis. In his opinion, the restrictive defect was related to Mr. Nixon's body stature and also possibly some element of coronary disease because of the existence of hypertension and diabetes mellitus. Dr. Goldstein did not specifically comment on the level of Mr. Nixon's pulmonary impairment, nor did he comment on whether Claimant retained the respiratory capacity to perform his last job in the mines. EX 1.

Dr. David Rosenberg reviewed Mr. Nixon's medical records, including the examinations and testing performed by Drs. Hawkins and Goldstein and provided a report dated April 11, 2005. EX 6. Dr. Rosenberg is board-certified in internal medicine, pulmonary disease and occupational medicine and is a B reader. EX 7. Dr. Rosenberg opined that Mr. Nixon does not have pneumoconiosis. Dr. Rosenberg explained that while the pulmonary function studies demonstrate restriction, it is related to body mass. He further explained that this determination is confirmed by the diffusing capacity corrected for lung volumes being normal, which indicates that the alveolar capillary bed within the lungs is intact. He also explained that the integrity of the interstitial portion of the lung was confirmed with the clear improvement on the arterial blood gas study with exercise. He also found that Mr. Nixon had a severe respiratory impairment that would render him incapable of performing his last coal mine employment. He determined, however, that the respiratory impairment was not related in any way to coal mine dust exposure, but was related to excessive body mass index with a weight of 265 pounds and height of 71 inches. Dr. Rosenberg explained that the association of excessive weight and presence of restriction is documented in medical literature. He further explained that had this type of restriction been due to coal workers' pneumoconiosis, the x-rays would have demonstrated advanced findings of such a disorder. Dr. Rosenberg further stated that Mr. Nixon has whole body impairments related to chronic dialysis, diabetes and hypertension, which are unrelated to his past coal dust exposure. Dr. Rosenberg further explained that there is no airflow obstruction of chronic obstructive pulmonary disease. He concluded that the evidence does not demonstrate either medical or legal coal workers' pneumoconiosis and that the total disability is related to excessive weight. EX 6.

Total Pulmonary or Respiratory Disability

A miner is considered totally disabled if he has complicated pneumoconiosis, 30 U.S.C. § 921(c)(3), 20 CFR § 718.304 (2005), or if he has a pulmonary or respiratory impairment to which pneumoconiosis is a substantially contributing cause, and which prevents him from doing his usual coal mine employment and comparable gainful employment, 30 U.S.C. § 902(f), 20 CFR § 718.204(b) and (c) (2005). The regulations provide five methods to show total disability other than by the presence of complicated pneumoconiosis: (1) pulmonary function studies; (2) blood gas studies; (3) evidence of cor pulmonale; (4) reasoned medical opinion; and (5) lay testimony. 20 CFR § 718.204(b) and (d) (2005). Lay testimony may only be used in establishing total disability in cases involving deceased miners, and in a living miner's claim, a finding of total disability due to pneumoconiosis cannot be made solely on the miner's statements or testimony. 20 CFR § 718.204(d) (2005); *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103, 1-106 (1994). There is no evidence in the record that Mr. Nixon suffers from complicated pneumoconiosis or cor pulmonale. Thus I will consider pulmonary function studies, blood gas studies and medical opinions. In the absence of contrary probative evidence, evidence from any of these categories may establish disability. If there is contrary evidence, however, I must weigh all the evidence in reaching a determination whether disability has been established. 20 CFR § 718.204(b)(2) (2005); *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986).

Pulmonary function studies were performed on December 18, 2003 by Dr. Hawkins, and on July 9, 2004 by Dr. Goldstein. All of the pulmonary function studies produced values that are qualifying under the Act.

Two arterial blood gas studies were performed in this claim. The first study, performed on December 18, 2003, produced a value that met a qualifying value under the Act. The second study, performed on July 9, 2004 produced values that did not qualify, either at rest or with exercise. Because the first study was qualifying, but both later studies were non-qualifying, I find the arterial blood gas studies do not establish total disability. As they measure a different aspect of lung function than do pulmonary function studies, however, they do not contradict a finding of disability based on the pulmonary function studies.

Dr. Hawkins' report was inconsistent on the issue of disability. He reported a severe restrictive impairment on the pulmonary function study, and a qualifying arterial blood gas study, but nonetheless noted only a "mild" respiratory impairment. He did not further explain his determination, nor did he comment whether Claimant was able to return to his previous coal mine employment or similar work in a dust-free environment, stating only that he should avoid additional exposure.

Dr. Goldstein did not specifically comment on the level of impairment, but did note a restrictive defect.

Dr. Rosenberg, who reviewed the examinations of both of these physicians, determined that Mr. Nixon has a severe respiratory impairment that would prevent him from performing his

previous coal mine employment. Dr. Rosenberg's report is well-reasoned, documented and explained, and I give it probative weight on this issue.

Accordingly, I find that based on the pulmonary function studies and the report of Dr. Rosenberg, Claimant has established that he is totally disabled from a respiratory standpoint. However, he is only entitled to benefits if he has also established that he suffers from pneumoconiosis, and that pneumoconiosis caused his disability.

Existence of Pneumoconiosis

The regulations define pneumoconiosis broadly:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.
>
> (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silico-tuberculosis, arising out of coal mine employment.
>
> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 CFR § 718.201 (2005).

20 CFR § 718.202(a) (2005) provides that a finding of the existence of pneumoconiosis may be based on (1) chest x-ray, (2) biopsy or autopsy, (3) application of the presumptions described in Sections 718.304 (irrebuttable presumption of total disability due to pneumoconiosis if there is a showing of complicated pneumoconiosis), 718.305 (not applicable to claims filed after January 1, 1982) or 718.306 (applicable only to deceased miners), or (4) a physician

exercising sound medical judgment based on objective medical evidence and supported by a reasoned medical opinion. There is no evidence that Mr. Nixon has had a lung biopsy, and, of course, no autopsy has been performed. None of the presumptions apply, because the evidence does not establish the existence of complicated pneumoconiosis, Claimant filed his claim after January 1, 1982, and he is still living. In order to determine whether the evidence establishes the existence of pneumoconiosis, therefore, I must consider the chest x-rays and medical opinions. Absent contrary evidence, evidence relevant to either category may establish the existence of pneumoconiosis. In the face of conflicting evidence, however, I must weigh all of the evidence together in reaching my finding whether the Claimant has established that he has pneumoconiosis. *U.S. Mining Co. v. Director, OWCP*, 386 F.3d 977 (11th Cir. 2004); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22 (3rd Cir. 1997).

Pneumoconiosis is a progressive and irreversible disease. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 314-315 (3rd Cir. 1995); *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 803 (4th Cir. 1998); *Woodward v. Director, OWCP*, 991 F.2d 314, 320 (6th Cir. 1993). As a general rule, therefore, more weight is given to the most recent evidence. See *Mullins Coal Co. of Virginia v. Director, OWCP*, 484 U.S. 135, 151-152 (1987); *Eastern Associated Coal Corp. v. Director, OWCP*, 220 F.3d 250, 258-259 (4th Cir. 2000); *Crace v. Kentland-Elkhorn Coal Corp*., 109 F.3d 1163, 1167 (6th Cir. 1997); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 602 (3rd Cir. 1989); *Stanford v. Director, OWCP*, 7 B.L.R. 1-541, 1-543 (1984); *Tokarcik v. Consolidated Coal Co*., 6 B.L.R. 1-666, 1-668 (1983); *Call v. Director, OWCP*, 2 B.L.R. 1-146, 1-148-1-149 (1979). This rule is not to be mechanically applied to require that later evidence be accepted over earlier evidence. *Woodward*, 991 F.2d at 319-320; *Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992); *Burns v. Director, OWCP*, 7 B.L.R. 1-597, 1-600 (1984).

Of the two available x-rays in this case, one has been ready by one reviewer to be positive for pneumoconiosis, and one x-ray has been read as negative. For cases with conflicting x-ray evidence, the regulations specifically provide,

> … where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays.

20 CFR § 718.202(a)(1) (2005); *Dixon v. North Camp Coal Co*., 8 B.L.R. 1-344 (1985); *Melnick v. Consolidation Coal Co*., 16 B.L.R. 1-31, 1-37 (1991). Readers who are board-certified radiologists and/or B-readers are classified as the most qualified. The qualifications of a certified radiologist are at least comparable to if not superior to a physician certified as a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-213 n.5 (1985). Greater weight may be accorded to x-ray interpretations of dually qualified physicians. *Sheckler v. Clinchfield Coal Co*., 7 B.L.R. 1-128, 1-131 (1984). A judge may consider the number of interpretations on each side of the issue, but not to the exclusion of a qualitative evaluation of the x-rays and their readers. *Woodward*, 991 F.2d at 321; *see Adkins*, 958 F.2d at 52.

The December 18, 2003 x-ray was read as positive by Dr. Ballard, who is dually qualified, and thought the x-ray to be "Quality 2." However, Dr. Barrett classified the film as "Quality 3" and Dr. Wiot found that the film was overexposed and unacceptable for ILO classification purposes. Both Drs. Wiot and Barrett are highly qualified as B-readers and radiologists. As two dually qualified physicians reported that the film quality was "3" or worse, I find that this film is entitled to little probative value. See *Gober v. Reading Anthracite Co*., 12 B.L.R. 1-67, 1-70 (1988) (suggesting that x-ray films that are quality "3" or found to be unreadable may be accorded little or no probative weight).

The July 9, 2004 x-ray was read negative by a B-reader, Dr. Goldstein, and a dually qualified physician, Dr. Wiot. There are no positive readings. I therefore find this x-ray to be negative for pneumoconiosis. Considering the questionable quality of the only x-ray with a positive reading, and the negative readings of the second x-ray by highly qualified physicians, I find the x-ray evidence is negative for pneumoconiosis.

I must next consider the medical opinions. The Claimant can establish that he suffers from pneumoconiosis by well-reasoned, well-documented medical reports. A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's work and social histories. *Hoffman v. B&G Construction Co*., 8 B.L.R. 1-65, 1-66 (1985); *Hess v. Clinchfield Coal Co*., 7 B.L.R. 1-295, 1-296 (1984); *Justus v. Director, OWCP*, 6 B.L.R. 1-1127, 1-1129 (1984). A "reasoned" opinion is one in which the judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields*, above. Whether a medical report is sufficiently documented and reasoned is for the judge to decide as the finder-of-fact; an unreasoned or undocumented opinion may be given little or no weight. *Clark v. Karst-Robbins Coal Co*., 12 B.L.R. 1-149, 1-155 (1989) (en banc).

The qualifications of the physicians are relevant in assessing the respective probative values to which their opinions are entitled. *Burns v. Director, OWCP*, 7 B.L.R. 1-597, 1-599 (1984). More weight may be accorded to the conclusions of a treating physician as he or she is more likely to be familiar with the miner's condition than a physician who examines him episodically. *Onderko v. Director, OWC*P, 14 B.L.R. 1-2, 1-6 (1989). However, a judge "is not required to accord greater weight to the opinion of a physician based solely on his status as the Claimant's treating physician. Rather, this is one factor which may be taken into consideration in … weighing … the medical evidence …" *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103, 1-105 (1994). Claimant has not identified any of the physicians submitting reports as his treating physician.

Dr. Hawkins diagnosed pneumoconiosis based on dyspnea, exposure history, impaired gas exchange and abnormal x-ray. However, I have determined that this x-ray is not reliable for establishing pneumoconiosis as the quality was questioned by two highly qualified physicians. In addition, despite the fact that pulmonary function and arterial blood gas testing produced qualifying values to establish disability, Dr. Hawkins assessed only a "mild" respiratory impairment. This apparent inconsistency, which he did not explain, undermines confidence in

the reasoning of his opinion, and ultimately, in his diagnosis.

While Dr. Hawkins diagnosed pneumoconiosis, Drs. Goldstein and Rosenberg both determined that Claimant does not have pneumoconiosis. The conflicting medical opinions must be weighed to resolve the contrary conclusions. A medical opinion which is supported by more extensive documentation is entitled to greater weight than an opinion based on more limited medical data. *Sabett v. Director, OWCP*, 7 B.L.R. 1-299, 1-301 n. 1 (1984). A medical opinion better supported by the objective medical evidence of record is entitled to more weight. *Minnich v. Pagnotti Enterprises, Inc*., 9 B.L.R. 1-89, 1-90 n.1 (1986).

After weighing all of the medical opinions of record, I resolve this conflict by according greater probative weight to the opinions of Drs. Goldstein and Rosenberg. Both possess excellent credentials in the field of pulmonary disease. Dr. Goldstein had the opportunity to examine the Claimant and Dr. Rosenberg had the opportunity to review both the medical reports of Dr. Hawkins and Goldstein. I also find their reasoning and explanation in support of their conclusions more complete and thorough than that provided by Dr. Hawkins, whose report is entitled to less weight for the reasons discussed above. Drs. Goldstein and Rosenberg also better explained how all of the evidence they developed and reviewed supported their conclusions. In addition, their reports are better supported by the medical evidence of record.

In sum, I do not completely discredit any of the medical opinions of record. In resolving the conflict presented by the physicians of record, however, I find the opinions of Drs. Goldstein and Rosenberg to merit greater probative weight. These credible and well reasoned medical opinions are convincing for purposes of establishing that the Claimant does not have pneumoconiosis or any other respiratory or pulmonary impairment arising out of coal mine work. This evidence out weighs the contrary conclusion provided by Dr. Hawkins. I conclude, therefore, that the weight of the medical opinions of record fails to establish that the Claimant has pneumoconiosis as the Act requires for entitlement to benefits.

Neither the x-ray evidence, nor the medical opinion evidence, weighed separately or together, is sufficient to establish the existence of pneumoconiosis. Nor has the Claimant shown its presence by any other means. I find that the Claimant has failed to meet his burden of showing that he has a pulmonary or respiratory disease attributable to his exposure to coal mine dust. Thus he cannot show that he is entitled to benefits under the Act.

FINDINGS AND CONCLUSIONS REGARDING ENTITLEMENT TO BENEFITS

Because the Claimant has failed to meet his burden to establish that he has pneumoconiosis or that his respiratory disability is due to pneumoconiosis, he is not entitled to benefits under the Act.

ATTORNEY FEES

The award of an attorney's fee under the Act is permitted only in cases in which the claimant is found to be entitled to benefits. Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 928, as incorporated into the Black Lung Benefits Act, 30 U.S.C.

§ 932. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services rendered to him in pursuit of this claim.

ORDER

The claim for benefits filed by James L. Nixon on September 11, 2003, is hereby DENIED.

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ALICE M. CRAFT
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).